

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APOT 146 OF 2022
IA No. GA 1 of 2022

**Sri Aurobindo Abasan
Vs.
Swastik Projects Pvt. Ltd. & Ors.**

Before:

The Hon'ble Justice Arijit Banerjee
&
The Hon'ble Justice Apurba Sinha Ray

For the Appellant : Mr. Bikash Ranjan Bhattacharya, Sr. Adv.
Mr. Soumya Majumder, Adv.
Mr. Amritam Mondal, Adv.
Mr. Partha Sarathi Ghosh, Adv.
Mr. Jay Chakraborty, Adv.
Mr. D. J. Chakraborty, Adv.
Mr. Sudip Dinda, Adv.

For the Respondent /Writ : Mr. Kalyan Bandyopadhyay, Sr. Adv.
Petitioner Mr. Ansar Mondal, Adv.
Mr. Aniruddha Chatterjee, Adv.
Mr. Nilay Sengupta, Adv.
Mr. Kushal Chatterjee, Adv.
Ms. Sayanti Nandy, Adv.

For the KMC : Mr. Ashoke Kumar Banerjee, Sr. Adv.
Mr. Barin Banerjee, Adv.
Mr. S.K. Debnath, Adv.

CAV On : 20.09.2022

Judgment On : 25.11.2022

Apurba Sinha Ray, J. :-

1. Being aggrieved and dissatisfied with the final judgment and order dated 01/07/2022 passed by the Hon'ble Single Judge in WPO No. 2187 of 2022, the appellant is before us.

2. The seeds of the present litigation were sown way back in the year 1984 when M/s. Mitra, Bhattacharjee and Associates purchased a plot of land of holding No. 46 which was being subdivided as 46C, Murari Pukur Road (Old), presently Biplabi Barin Ghosh Sarani comprising 9 Bighas 10 Cottahs and one Dr. Bhajan Chaudhuri being the Power of Attorney Holder of the said Associates and Secretary of Sri Aurobindo Abasan had developed the said land with the permission of the Kolkata Municipal Corporation. An agreement between KMC and the said Power of Attorney Holder was executed for the purpose of development of a private road on the aforesaid land on certain conditions in a time bound manner and subsequently as per Section 368 of the Kolkata Municipal Corporation Act the said private road measuring about 10.3 metres was taken over by the Kolkata Municipal Corporation. However, a resolution dated 16.04.1988 was adopted by the Mayor-in-Council Committee wherein it was stated that the developer by a letter dated 12.03.1988 requested Kolkata Municipal Corporation for taking

over the road as the development work pursuant to the agreement between Kolkata Municipal Corporation and the said Power of Attorney Holder was complete. It is also revealed from the material on record that on 20.09.1988 the Developer and Secretary of the appellant/Abasan Committee addressed a letter to the Mayor-in-Council, Kolkata Municipal Corporation stating that though the representatives of the sister departments of the Kolkata Municipal Corporation attended the site of 1988 for formal taking over of the road but unfortunately the said taking over could not be effected for the existence of an iron gate and electric meter room at the main entrance of the road. By the said letter the Developer and the Secretary of the appellant Abasan had requested for conditional taking over or temporarily putting in abeyance the taking over of the road by the Kolkata Municipal Corporation. The record further shows that the said request made by the Developer-cum-Secretary of appellant /Abasan committee was not paid heed to and subsequently on the basis of undertakings given by the said Secretary, it was resolved by the Kolkata Municipal Corporation and notified for all concerned that pursuant to the resolution dated 20.01.1989 adopted by the Mayor-in-Council, the Kolkata Municipal Corporation at their meeting held on 20.01.1989, the 10 metre wide road along with iron gate, watch man's

room and boundary wall at 46 Biplabi Barin Ghosh Sarani in Ward No. 14 as delineated in the plan prepared for the purpose, has been taken over by the Kolkata Municipal Corporation under Section 368 of the Kolkata Municipal Corporation Act, 1980 and the road was declared as public.

3. It is also revealed that on the connected road from Biplabi Barin Ghosh Sarani in Ward No. 14 Borough – III to Sri Aurobindo Abasan being Premises No. 46C, Biplabi Barin Ghosh Sarani an iron gate, watch man's room and boundary wall surrounding the said Aurobindo Abasan was taken over by the Kolkata Municipal Corporation but a licence for operation of the gate was given to the Secretary of Sri Aurobindo Abasan for further five years as resolved in Item No. 60.31 in a meeting of the Mayor-in-Council dated 20.01.1989. In the said meeting, it was also resolved that after expiry of five years, the said structures would be demolished so as to make unobstructed connections of the new road within the said Abasan. According to Kolkata Municipal Corporation as well as the writ petitioner, who purchased plots adjoining Aurobindo Abasan, the appellant Aurobindo Abasan has no right to look after the iron gate along with boundary wall and 10 metre inside road after five years from 20.01.1989. The gate and the watch man's room at premises No. 46C, Biplabi Barin Ghosh Sarani were all

made public and Sri Aurobindo Abasan cannot claim them now as its own properties since the Kolkata Municipal Corporation has taken over the land and five years period as referred to above has already expired. As 10 metres road as aforesaid has already been taken over by the Kolkata Municipal Corporation, none can claim personal right over the gate, watch man's room and the relevant boundary wall. The writ petitioner being resisted from using the 10 metre wide road as aforesaid moved before the Hon'ble Court at Calcutta by filing the Writ Petition No. 2187 of 2022 on the grounds, inter alia, that the appellant Abasan herein and its men and agents are creating obstruction and disturbance to the writ petitioner and its men and agents for using the road as public road. After taking reports from the concerned officer of Kolkata Municipal Corporation the Hon'ble Single Judge has passed the following order on 01/07/2022:-

“In terms of the order passed by this Court on 16th June, 2022, a report dated 27th June, 2022 has been filed by the Officer on Special Duty and Ex. Officio Chief Valuer & Surveyor, Kolkata Municipal Corporation.

The said report mentions that as per resolution of the Mayor-in-Council's meeting dated 20th January, 1989 and as per notification published in the daily newspaper on 31st March, 1989, Sri Aurobindo Abasan has no right to look after the iron gate along with the boundary wall and 10 metre inside road after five years from 20th January, 1989.

The gate and the watchman's room in the premises no. 46C, Biplabi Barin Ghosh Sarani were all made public and the respondent Sri Aurobindo Abasan cannot claim those now as its own property as the public easement is attached since the Kolkata Municipal Corporation took over those in the year 1989 and five years period already expired. None can claim the personal right over the gate, watchman's room and boundary wall.

On inspection, the department observed that the entrance iron gate and single storied corrugated iron shaded watchman's room still exist at site. The Kolkata Municipal Corporation intends to take necessary action to remove the aforesaid structure immediately.

From the aforesaid report which has been filed in Court today, copy whereof has been circulated amongst the parties, it appears that Sri Aurobindo Abasan does not have any right over the gate, watchman's rooms, boundary wall and the lane is a public lane in view of the resolution adopted by the Kolkata Municipal Corporation and as per the notification published in the newspaper way back on 31st March, 1989.

The aforesaid notification was in the public domain as the same was published in the daily newspaper. Members of Sri Aurobindo Abasan did not raise any objection when the same was published in the year 1989.

It further appears from the report that the license for operation of the gate was conferred upon the Honorary Secretary of Sri Aurobindo Abasan for a period of five years only. The terms of five years expired long back and accordingly Sri Aurobindo Abasan cannot claim to hold on to the same, today.

In view of the above, the Kolkata Municipal Corporation is directed to take prompt necessary steps in accordance with law in terms of the report that has been filed in Court today.

No further order is required to be passed in the instant writ petition.

The writ petition stands disposed of.

Report dated 27th June, 2022 filed by the Officer on Special Duty and Ex. Officio Chief Valuer & Surveyor, Kolkata Municipal Corporation in Court today be retained with the records.

Urgent certified photocopy of this order, if applied for, be supplied to the parties expeditiously on compliance of usual legal formalities.”

4. The said Sri Aurobindo Abasan was aggrieved by the said order. Hence this appeal.

5. Learned Senior Counsel, Sri Bikash Ranjan Bhattacharjee, appearing for the appellant has submitted before this Court that the relevant street has been used by the inmates of Sri Aurobindo Abasan for a long time i.e. more than 30/35 years in exclusion of others and there is no objection from any side over such use of the relevant street by the residents of Sri Aurobindo Abasan. Learned Counsel has also submitted that even after publication of the relevant notification in Amrita Bazar Patrika on 31.03.1989 or five years therefrom, the Kolkata Municipal Corporation did not obstruct or resist such exclusive use of the street by the residents of Aurobindo Abasan and allowed them to use and treat the same as private street. Moreover, the authority did not remove the boundary wall from its original place. According to the learned Senior Counsel of the appellant, neither the Kolkata Municipal Corporation nor the writ petitioner can claim the said street to be public street since the said street has lost its status as public street due to the principle of disuse. The learned Counsel has drawn the attention of this

court to the paragraphs of plaint in the civil suit instituted by the writ petitioner against the residents of Sri Aurobindo Abasan and submitted that the contents of the said plaint reflect that the relevant street has been used only by the inmates of Aurobindo Abasan for egress from and ingress to their residential houses.

6. Learned Counsel has also harped on the point that the definition of 'building' also includes its boundary walls. As the inmates of Sri Aurobindo Abasan have been using the said street and boundary wall surrounding Sri Aurobindo Abasan and its cluster of houses for 30/35 years without interruption from the Kolkata Municipal Corporation or anybody else, the inmates have acquired a right by virtue of the doctrine of disuse.

7. Learned Counsel has also drawn the attention of this court to the proviso to Section 368 of Kolkata Municipal Corporation Act, 1980 in support of his contention. He also referred to a case reported in **2013 (1) CLT 652**. According to him, the situation in 1989 is not same as in the year 2022. As Kolkata Municipal Corporation has failed to take steps in terms of the relevant notification published in Amrita Bazar Patrika on 31.03.1989, such inaction on the part of the Kolkata Municipal Corporation cannot operate against the inhabitants of Sri Aurobindo Abasan.

8. In contradicting the submission of learned Counsel of the appellant, learned Senior Counsel Sri Kalyan Bandhopadhyay, on behalf of the writ petitioner/respondent has categorically submitted that the judgment and

order dated 1.7.2022 does not suffer from any illegality or infirmity and hence this court should not interfere with the same. Learned Counsel referred to several materials on record including the affidavit submitted on behalf of the Kolkata Municipal Corporation and its annexures, advertisement published in Amrita Bazar Patrika on 31.03.1989, and also the letters, written undertaking submitted on behalf of the appellant. According to learned Counsel, the said advertisement which was not challenged, made it clear that after five years from the date of publication of the said notification, the Abasan authority would not have any control over the 10.3 metres road, iron gate and watch man's room. As the writ petitioner no.1 purchased the property in the year 2013 for valuable consideration it has the right to use the relevant street as public street and the residents of Sri Aurobindo Abasan cannot resist or prevent them from using the same, as the said street has long been taken over by the Kolkata Municipal Corporation by virtue of the undertaking given by the then Secretary of Sri Aurobindo Abasan Committee. As the material on record suggest that taking over of the 10.3 metre road has already been effected by the Kolkata Municipal Corporation, the appellant cannot go against the order passed by Kolkata Municipal Corporation and against its own undertaking.

9. Senior Counsel Mr. Ashoke Kumar Banerjee appearing for Kolkata Municipal Corporation has posed a question to himself, i.e., whether KMC's inaction gives some premium to the Aurobindo Abasan Committee? According to him, if that is what the appellant contends, then it indirectly

admits that the initial action of Kolkata Municipal Corporation was legal. Learned Senior Counsel has also pointed out that Sri Aurobindo Abasan entered into an agreement with the Kolkata Municipal Corporation authority and the records show that the relevant private street was vested in the Corporation as public street and when a land or street is vested in the Corporation, the same cannot be divested. According to him, the basic point is “your inaction cannot give me any premium”. Learned Senior Counsel has pointed out that KMC’s inaction, if any, does not give any extra privilege to the appellant. The Abasan Committee cannot raise the issue now in view of the undertaking given through its Secretary and hence the appellant is now estopped from changing its stance. Learned Senior Counsel has referred to a case reported in AIR 2008 SC 693 to impress upon the court that there must be circumstantial flexibility to adopt any precedent.

10. After considering the submissions made on behalf of the parties and also the material on record, the single question that is required to be answered is whether the relevant street is a public street or it is a private street only for the use of the inhabitants of Sri Aurobindo Abasan.

11. The law does not favour *res nullius* in respect of any property. In fact a property must be owned by somebody as per law. Learned Counsel appearing for the appellant has submitted that the relevant road is a private street and not a public street and therefore the writ petitioner or the KMC cannot claim any right over the same. **Salmond in his treatise**

‘Jurisprudence’ 9th Edition, under the chapter **‘The Law of Property’** has pointed out that there are four modes of acquisition of property and they are possession, prescription, agreement and inheritance. According to him, property may be acquired through possession which means physical control over a thing or an object. Possession, in his wisdom, is the continuing exercise of a claim to the exclusive use of an object. He was of the opinion that the possessor of a property enjoys good title until evicted by the real owner.

12. A property may be acquired by way of prescription, due to lapse of time. According to Salmond, prescription may be defined as the effect of lapse of time in creating and destroying rights. It is the portion of time as a vestitive fact. He has pointed out that prescription may be of two kinds such as positive prescription meaning right over the property acquired by lapse of time and secondly, negative prescription meaning destroying the right on his property with lapse of time.

13. Salmond further opines that property may also be acquired by agreement which is enforceable by law. Another mode of acquiring property is by means of inheritance. When a person dies certain rights survive him and pass on to his heirs and successors. There are other rights which die with him. Those rights which survive him are called heritable or inheritable rights.

14. It is true that a Writ Court whether at the first instance or in appeal, is not competent to make a detailed investigation to the title or ownership of the property in question. But the submission and counter-submission raised in this appeal or before the Writ Court compel us to observe that unless the relevant issue is discussed in its proper perspective, there would be a great abuse of process of the Court, and multiplicity of suits may follow.

15. The submission made by the learned Counsel of the appellant revolves around the fact that as on or after 20th January, 1994, KMC or any other person on its behalf did not take any action as per the notification published in the Amrita Bazar Patrika in respect of the relevant street, Sri Aurobindo Abasan or its inmates have acquired exclusive right to use the same as private street. But we are unable to understand what is the status of the said inmates in relation to that street in view of such alleged inaction on the part of KMC. We did not receive any proper answer from the appellant, whether it is claiming its right over the said street by virtue of adverse possession or prescription or through any other acceptable mode of acquisition of property.

16. The principle of disuse as adverted to before us by learned Counsel of the Appellant, in fact, does not give any proprietary right to the appellant over the said street. Jurisprudential study reveals that to claim title over a land belonging to government or corporation, hostile title is required to be set up against such government or corporation for more than 30 years.

Moreover, there is no claim from the side of the appellant that it is claiming the said street as private street by way of prescription. The question of inheritance does not arise in this case at all. There is no agreement between the concerned parties that the said street would belong to the appellant from any point of time. Therefore, the claim of the appellant that it has become owner or the exclusive user of the said street by virtue of principle of disuse is totally untenable in the realm of law. The reference to the proviso to Section 368 of KMC Act, 1980 does not strengthen the case of the Appellant. On the other hand, the KMC as well the respondent/writ petitioner have been able to show from the material on record that the concerned street was developed by the developer and secretary of the appellant on the basis of written agreement with KMC and after the completion of the work as per the said agreement the street has been taken over by KMC, and on certain requests some privileges were granted to the appellant for a certain period of time. After expiry of such period, KMC had every right to withdraw the said privileges as per the agreement as well as undertaking given from the side of the appellant. As such, we do not find any infirmity or illegality in the order under appeal.

Arijit Banerjee, J.:

1. I completely agree with the views of and conclusion reached by my learned brother. However I take the liberty of adding a few words.

2. At best, the appellant was granted licence or permission for five years by Kolkata Municipal Corporation to maintain the road in question. The boundary wall and watch man's room were supposed to be demolished after 5 years. Inaction on the part of the Corporation Authorities cannot create any right of exclusive user of the road in question, in favour of the members of the appellant society.

3. In as far as the appellant's reliance on the principle of disuse or doctrine of *desuetude* is concerned, the same is misplaced. The jurisprudential meaning of *desuetude* is that long and continued non-use of a particular piece of legislation renders it invalid and ineffective in the sense that violation of such law will not be considered to be an offence or civil wrong as the case may be, by the Court. It does not appear that the Indian Courts have applied this principle to any particular statute.

4. In the case of ***State of Maharashtra v. Narayan Shamrao Puranik & Ors., Reported in (1982) 3 SCC 519***, a three Judge Bench of the Hon'ble Supreme Court observed that a statute can be abrogated only by expressed or implied repeal. It cannot fall into *desuetude* or become inoperative through obsolescence or by lapse of time.

5. However, in the case of ***Municipal Corporation For City of Pune and Anr. v. Bharat Forge Co. Ltd. & Ors. Reported in (1995) 3 SCC 434*** at paragraph 34 a three Judge Bench of the Supreme Court without noticing the earlier judgment observed as follows:-

“34. Though in India the doctrine of desuetude does not appear to have been used so far to hold that any statute has stood repealed because of this process, we find no objection in principle to apply this doctrine to our statutes as well. This is for the reason that a citizen should know whether, despite a statute having been in disuse for long duration and instead a contrary practice being in use, he is still required to act as per the “dead letter”. We would think it would advance the cause of justice to accept the application of doctrine of desuetude in our country also. Our soil is ready to accept this principle; indeed, there is need for its implantation, because persons residing in *free* India, who have assured fundamental rights including what has been stated in Article 21, must be protected from their being, say, prosecuted and punished for violation of a law which has become “dead letter”. A new path is, therefore, required to be laid and trodden.”

6. In the case of ***Cantonment Board, Mhow & Anr. v. M.P. State Road Transport Corpn. Reported in (1997) 9 SCC 450*** a two Judge Bench of the Hon’ble Supreme Court, after referring to the decision in the case of ***Municipal Corporation for City of Pune*** held that to apply the principle of desuetude it is necessary to establish that the statute in question has been in disuse for long and a contrary practice of some duration has evolved.

7. It is thus clear that the doctrine of *desuetude* is one which may be made applicable to a statute to render it obsolete. However, whether or not Indian jurisprudence has accepted the doctrine is doubtful.

8. In any event, the doctrine of *desuetude* cannot be invoked to contend that since the members of the public in general have not used the road in question for some time, an exclusive right to use such road has arisen in favour of the members of the appellant society and the road has become in the nature of a private one.

9. The appeal and the connected application deserve to be and are dismissed without any order as to costs.

10. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

I agree.

(APURBA SINHA RAY, J.)

(ARIJIT BANERJEE, J.)

Later

After the judgment is delivered, learned Advocate for the appellant prays for stay of operation of the judgment and order. Such prayer is considered and rejected.

(APURBA SINHA RAY, J.)

(ARIJIT BANERJEE, J.)